shall not apply to the proposed sale by to the Plan of certain limited partnership units (the Units) in two limited partnerships to the J.H. Heafner Company, Inc. (Heafner), provided the following conditions are satisfied: a) the sale is a one-time transaction for cash; b) the Plan pays no commissions or other expenses in connection with the transaction; and c) the Plan receives no less than the greater of: (1) its cost for the Units; or (2) the fair market value of the Units on the date of the sale.

Summary of Facts and Representations

1. The Plan is a defined contribution profit sharing plan established by Heafner under the provisions of section 401(k) of the Code. The Plan currently has 392 participants, and had assets of $5,728,370 as of June 30, 1995. Heafner is a North Carolina corporation which has 30 distribution centers throughout the Southeast involved in the wholesale distribution of tires and automotive equipment and wheels.

2. Among the assets in the Plan are the Units, which are interests in two limited partnerships, which are unrelated to Heafner. Heafner has no interests in either of the partnerships. One partnership is Realty Parking Properties L.P. (RPP), and the second is Atlantic Income Properties (Atlantic). The Plan purchased 1,600 Units in RPP on June 2, 1989 for a purchase price of $40,000. The Plan purchased 5,000 Units in Atlantic on April 5, 1989 for a purchase price of $100,000. The Plan's investment broker, Interstate Johnson Lane, purchased the Units in both partnerships on behalf of the Plan on the open market. There are a total of 1,909,087 units of RPP as of June 30, 1995, so the Plan's Units represent approximately .08% of the total units. There are a total of 508,844 units of Atlantic outstanding, so the Plan's Units represent approximately .98% of the total units. The applicant represents that the Units are non-liquid in nature with no ready market for their sale.

3. The Plan now proposes to sell the Units to Heafner. The applicant represents that the Units are the only non-liquid assets contained in the Plan, except for those invested in the NCNB Real Estate Fund, which the North Carolina National Bank is moving to liquidate itself. Currently, the Plan's trustees have frozen these fixed asset accounts to preserve the principal base for all participants who have money invested in these assets. Due to the non-liquid nature of the assets, there are no allowable distributions currently until the liquidity improves. The applicant represents that the presence of these assets has made Plan administration difficult and that the current freeze is unfair to participants. The applicant represents that before considering a sale to Heafner, the Plan's trustees investigated the possibility of selling the Units on the open market and found that there was no market.

4. The sale price will be the higher of the Plan's cost for the Units or their fair market value as of the date of the sale. Any costs that will be incurred in the proposed transaction will be borne by Heafner. Ms. Denise Liekfet of RPP has represented that as of December 31, 1994, the Units of RPP had an appraised fair market value of $22.50 per Unit, or a total value of $36,000. Since the Plan's cost for these Units was $40,000, Heafner proposes to pay $40,000 to the Plan. Ms. Tammy L. Stempler of ISC Realty Corporation, General Partner of Atlantic has represented that as of March 30, 1995 the Units in Atlantic had an appraised fair market value of $13 per Unit, or a total value of $65,000. Since the Plan's cost for these units was $100,000, Heafner proposes to pay $100,000 to the Plan.[5]

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act because: a) the sale is a one-time transaction for cash; b) the Plan will pay no commissions or other expenses in connection with the transaction; and c) the sale price will be the higher of the Plan's cost of the Units or the current fair market value of the Units as determined by independent appraisal.

Tax Consequences of the Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value, such excess may be considered to be a contribution by the sponsoring employer to the plan, and therefore must be examined under the applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, DC, this 31st day of October, 1995.

U.S. Department of Labor.

Ivan Strasfeld,

Director of Exemption Determinations Pension and Welfare Benefits Administration.

[FR Doc. 95–27295 Filed 11–2–95; 8:45 am]

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[5] Heafner represents that should the Plan receive greater than the fair market value of the Units, the excess, if treated as a contribution to the Plan, would not cause the Plan to violate sections 401(a)(4), 404 or 415 of the Code.

[Prohibited Transaction Exemption 95–100; Exemption Application No. D–9500 , et al.]

Grant of Individual Exemptions; Fidelity Management Trust, et al.

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Notices were published in the Federal Register of the pendency before the Department of proposals to grant such exemptions. The notices set forth a summary of facts and representations contained in each application for exemption and referred interested persons to the respective applications for a complete statement of the facts and representations. The applications have been available for public inspection at the Department in Washington, D.C. The notices also invited interested persons to submit comments on the requested exemptions to the Department. In addition the notices stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicants have represented that they have complied with the requirements of the notification to interested persons. No public comments and no requests for a hearing, unless otherwise stated, were received by the Department.

The notices of proposed exemption were issued and the exemptions are being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990) and based upon the entire record, the Department makes the following findings:

(a) The exemptions are administratively feasible;

(b) They are in the interests of the plans and their participants and beneficiaries; and

(c) They are protective of the rights of the participants and beneficiaries of the plans.

Fidelity Management Trust Company (FMTC) and its Affiliates (collectively, Fidelity) Located in Boston, Massachusetts

[Prohibited Transaction Exemption 95–100; Application No. D–9500]

Section I—Exemption for Payment of Certain Fees to Fidelity

The restrictions of section 406(b)(1) and (b)(2) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1)(E) of the Code, shall not apply to the payment of certain performance fees (the Performance Fee) to Fidelity by employee benefit plans for which Fidelity provides investment management or discretionary trustee services (the Client Plans) pursuant to an investment management or trust agreement (the Agreement) entered into between Fidelity and the Client Plans either individually, through the establishment of a single client separate account (Single Client Account), or collectively as participants in a multiple client commingled account (Multiple Client Account), provided that the conditions set forth below in Section III are satisfied. (Single Client Accounts and Multiple Client Accounts are collectively referred to herein as Accounts.)

Section II—Exemption for Investments in a Multiple Client Account

The restrictions of section 406(a)(1) (A) through (D) of the Act and the taxes imposed by section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code, shall not apply to any investment by a Client Plan in a Multiple Client Account managed by Fidelity, provided that the conditions set forth below in Section III are satisfied.

Section III—General Conditions

(a) The investment of plan assets in a Single or Multiple Client Account, including the terms and payment of any Performance Fee, shall be approved in writing by a fiduciary of a Client Plan which is independent of Fidelity (the Independent Fiduciary). Notwithstanding the foregoing, Fidelity may authorize the transfer of cash from a Single Client Account to a Multiple Client Account provided that: (1) The Multiple Client Account has similar investment objectives and the identical fee structure as the Single Client Account; (2) the Agreement governing the Single Client Account authorizes Fidelity to invest in a Multiple Client Account; (3) Fidelity receives no additional fees from the Single Client Account for cash invested in the Multiple Client Account; (4) a binding commitment to make the transfer to the Multiple Client Account occurs within six months of the Independent Fiduciary's decision to allocate assets to the Single Client Account or, in the event Fidelity's binding commitment to make the transfer occurs more than six months after such fiduciary's decision, Fidelity obtains an additional authorization from the Independent Fiduciary; and (5) each transfer of assets from the Single Client Account to the Multiple Client Account occurs within sixty (60) days of the actual transfer of such assets to the Single Client Account.

(b) The terms of any investment in an Account and of any Performance Fee shall be at least as favorable to the Client Plans as those obtainable in arm's-length transactions between unrelated parties.

(c) At the time any Account is established and at the time of any subsequent investment of assets (including the reinvestment of assets) in such Account:

(1) Each Client Plan shall have total net assets with a value in excess of $50 million or, alternatively, be represented by an Independent Fiduciary that is responsible for the investment of at least $50 million in ''plan assets'' subject to the provisions of the Act; and

(2) No Client Plan shall invest, in the aggregate, more than five percent (5%) of its total assets in any Account or more than ten percent (10%) of its assets in all Accounts established by Fidelity.

(d) Prior to making an investment in any Account, the Independent Fiduciary of each Client Plan investing in an Account shall receive offering materials from Fidelity which disclose all material facts concerning the purpose, structure, and operation of the Account, including any fee arrangements.

(e) With respect to its ongoing participation in an Account, the Independent Fiduciary of each Client Plan shall receive the following written information from Fidelity:

(1) Audited financial statements of the Account prepared by independent public accountants selected by Fidelity no later than ninety (90) days after the end of the fiscal year of the Account;

(2) Quarterly and annual reports prepared by Fidelity relating to the overall financial position of the Account and, in the case of a Multiple Client Account, the value of such Client Plan's interest in the Account. Each such report shall include a statement regarding the amount of fees paid to Fidelity during the period covered by such report;

(3) Annual reports indicating the fair market value of the Account's assets

determined using market sources and valuation methodologies acceptable to the Independent Fiduciary of the Client Plan for a Single Client Account or the responsible independent fiduciaries of Client Plans and other authorized persons acting for investors in a Multiple Client Account (the Responsible Independent Fiduciaries, as defined in Section IV(c) below), or if market sources are not available, values determined by a qualified appraiser independent of Fidelity which has been approved by the Independent Fiduciary or Responsible Independent Fiduciaries. However, no independent appraisals shall be required unless such appraisals are necessary for purposes of determining any compensation due to Fidelity based on the value of the assets in the Account for that period; and

(4) In the case of any Multiple Client Account, a list of all other investors in the Account.

(f) The total fees paid to Fidelity shall constitute no more than reasonable compensation.

(g) The Performance Fee shall be payable after the Client Plan has received distributions from the Account in excess of an amount equal to 100% of its invested capital plus a pre-specified annual compounded cumulative rate of return (the Threshold Amount), except that in the case of Fidelity's removal or resignation, Fidelity shall be entitled to receive a Performance Fee payable either at the time of removal, or in the event of Fidelity's resignation, on the scheduled termination date of the Account, subject to the requirements of paragraph (j) below, as determined by a deemed distribution of the assets of the Account based on an assumed sale of such assets at their fair market value (in accordance with market sources or independent appraisals as described in paragraph (k) below), only to the extent that the Client Plan would receive distributions from the Account in excess of an amount equal to the Threshold Amount at the time of Fidelity's removal or resignation. Both the Threshold Amount and the amount of the Performance Fee, expressed as a percentage of the amount distributed (or deemed distributed) from the Account in excess of the Threshold Amount, shall be established by the Agreement and agreed to by the Independent Fiduciary of the Client Plan.

(h) The Threshold Amount for any Performance Fee shall include at least a minimum rate of return to the Client Plan, as defined below in Section IV(d). The Independent Fiduciary acting for a Client Plan shall specifically agree in writing with Fidelity, prior to any investment in the Account, that it would be appropriate for the minimum rate of return applicable to the Account to be based upon the rate of change in the consumer price index (CPI) during the period specified in the Agreement, as described in Section IV(d).

(i) For any sale of an asset in an Account which shall give rise to the payment of a Performance Fee to Fidelity prior to the termination of the Account, the sale price of the asset shall be at least equal to a target amount (the Target Amount), as defined in Section IV(e), in order for Fidelity to sell the asset and receive its Performance Fee without further approvals. If the proposed sale price of the asset is less than the Target Amount, the proposed sale shall be disclosed to and approved by the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, in which event Fidelity will be entitled to sell the asset and receive its Performance Fee. If the proposed sale price is less than the Target Amount and the Independent Fiduciary's or Responsible Independent Fiduciaries' approval is not obtained, Fidelity shall still have the authority to sell the asset, if the Agreement provides Fidelity with complete investment discretion for the Account, provided that the Performance Fee that would have been payable to Fidelity by reason of the sale of the asset is paid only at the termination of the Account.

(j) In the event Fidelity resigns as investment manager or trustee of an Account, the Performance Fee shall be calculated at the time of resignation based upon a deemed distribution of the assets of the Account at their fair market value (determined using market sources or independent appraisals as described in paragraph (k) below). The amount arrived at by this calculation shall be multiplied by a fraction, the numerator of which shall be the sum of the disposition proceeds of all assets in the Account received prior to the termination date plus the fair market value of the assets remaining in the Account on the termination date and the denominator of which shall be the aggregate value of the assets in the Account used in determining the amount of the Performance Fee as of the date of resignation, provided that this fraction shall never exceed 1.0. The resulting amount shall be the Performance Fee payable to Fidelity on the scheduled termination date of the Account.

(k) With respect to the valuation of the assets in an Account for purposes of determining any Performance Fee based on a deemed distribution of such assets, Fidelity shall establish the fair market value for the assets using market sources and valuation methodologies disclosed to, and approved in writing by, the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account. In the event market sources are not available for the valuation of assets in the Account, the fair market value of such assets shall be determined by an independent qualified appraiser approved by either the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account prior to any valuation of the assets. If a new appraiser for an asset is chosen by Fidelity, the appraiser shall be approved by such Fiduciaries prior to any valuation of the asset. In any event, the fair market value of all assets involved in any deemed distribution shall be based on the current market value of such assets as of the date of the transactions giving rise to the payment of the Performance Fee.

(l) Fidelity shall maintain, for a period of six years, the records necessary to enable the persons described in paragraph (m) of this Section III to determine whether the conditions of this exemption have been met, except that: (1) A prohibited transaction will not be considered to have occurred if, due to circumstances beyond the control of Fidelity, the records are lost or destroyed prior to the end of the six year period, and (2) no party in interest, other than Fidelity, shall be subject to the civil penalty that may be assessed under section 502(i) of the Act or to the taxes imposed by section 4975 (a) and (b) of the Code if the records are not maintained or are not available for examination as required by paragraph (m) below.

(m)(1) Except as provided in paragraph (m)(2) and notwithstanding any provisions of sections 504(a)(2) and (b) of the Act, the records referred to in paragraph (l) of this Section III shall be unconditionally available at their customary location for examination during normal business by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) Any fiduciary of a Client Plan or any duly authorized employee or representative of such fiduciary;

(iii) Any contributing employer to any Client Plan or any duly authorized employee or representative of such employer; and

(iv) Any participant or beneficiary of any Client Plan, or any duly authorized employee or representative of such participant or beneficiary.

(2) None of the persons described above in paragraph (m)(1) (ii)–(iv) shall be authorized to examine the trade secrets of Fidelity or any commercial or financial information which is privileged or confidential.

Section IV—Definitions

(a) An ''affiliate'' of a person includes:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee, relative of, or partner of any such person; and

(3) Any corporation or partnership of which such person is an officer, director, partner or employee.

(b) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) The term ''Responsible Independent Fiduciaries'' means with respect to a Multiple Client Account the Independent Fiduciary of Client Plans invested in the Account and other authorized persons acting for investors in the Account which are not employee benefit plans as defined under section 3(3) of the Act (such as governmental plans, university endowment funds, etc.) that are independent of Fidelity and that collectively hold at least 50% of the interests in the Account.

(d) The term ''Threshold Amount'' means with respect to any Performance Fee an amount which equals all of a Client Plan's capital invested in an Account plus a pre-specified annual compounded cumulative rate of return that is at least a minimum rate of return determined as follows:

(1) A non-fixed rate which is at least equal to the rate of change in the CPI during the period from the deposit of the Client Plan's assets in the Account until distributions of the Client Plan's assets from the Account equal or exceed the Threshold Amount; or

(2) A fixed rate which is at least equal to the average annual rate of change in the CPI over some period of time specified in the Agreement, which shall not exceed 10 years.

(e) The term ''Target Amount'' means a value assigned to each asset in the Account established by Fidelity either (1) at the time the asset is acquired, by mutual agreement between Fidelity and the Independent Fiduciary for a Single Client Account or the Responsible Independent Fiduciaries for a Multiple Client Account, or (2) pursuant to an objective formula approved by such fiduciaries at the time the Account is established. However, in no event will such value be less than the acquisition price of the asset.

(f) The term ''Account'' means any Single Client Account or Multiple Client Account established with Fidelity, under a written investment management or trust agreement, that is invested primarily (i.e. more than 50%) in securities or other assets which are not publicly-traded equity securities or publicly-traded, investment grade debt securities, pursuant to written instructions and guidelines established and approved by an Independent Fiduciary for the Client Plan prior to any investment by the Client Plan in the Account. For purposes of an ''Account'' meeting the 50% test for assets which are not ''publicly-traded equity securities'' or ''publicly-traded, investment grade debt securities'', any private market securities held by the Account that become publicly-traded securities shall not be considered as such for a period of thirty (30) months following the date such securities become publicly-traded so as to allow Fidelity sufficient time to dispose of such securities in order for the Account to remain primarily invested in assets which are not publicly-traded securities, including for such purposes any publicly-traded debt securities which are not investment grade.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption (the Proposal) published on June 15, 1995, at 60 FR 31501.

Written Comments and Modifications

The Department received one comment letter from interested persons regarding the Proposal. The comment letter was from Russell L. Olson, Director, Pension Investment, Worldwide, Eastman Kodak Company in Rochester, New York (the Commenter).

The Commenter made two recommendations regarding the conditions contained in the Proposal.

First, the Commenter notes that Section III(c)(1) of the Proposal requires that each Client Plan must have total net assets with a value in excess of $50 million. The Commenter states that the Proposal's language would foreclose the use of such a Fidelity performance-fee based Account to a small pension fund whose named fiduciary is the same as that which is named fiduciary of a multi-billion dollar pension fund, but with which the smaller pension fund is not commingled. The Commenter believes that such an Account may be equally as appropriate for the small pension fund as for the large, provided that the smaller pension fund is represented by a sophisticated fiduciary. Thus, the Commenter recommends that Section III(c)(1) be revised to require only that each Client Plan be represented by an Independent Fiduciary that is responsible for the investment of more than $50 million of ''plan assets'' subject to the provisions of the Act.[1]

Second, the Commenter notes that Section III(i) of the Proposal requires, in pertinent part, that

> ''* * * If the proposed sale price of an asset is less than the Target Amount, the proposed sale shall be disclosed to and approved by the Independent Fiduciary * * * or [if the] Independent Fiduciary's * * * approval is not obtained, Fidelity shall still have the authority to sell the asset, if the Agreement provides Fidelity with complete investment discretion for the Account, provided that the Performance Fee that would have been payable to Fidelity by reason of the sale of the asset is paid only at the termination of the Account.''

The Commenter recommends that this provision be eliminated. In this regard, the Commenter states that this condition would make it more cumbersome for Fidelity to sell a less successful investment. The Commenter represents that, as an investor, it would view any such impediment as counter to the best interest of plan participants.

By letter dated August 16, 1995, Fidelity responded to the comments made by the Commenter. Fidelity expressed support for the Commenter's suggested revisions to the Proposal to the extent the Department would be willing to adopt such changes. However, Fidelity noted that it would also be willing to accept an exemption as proposed on these issues to avoid any material delay in the processing of a final exemption.

With respect to the first recommendation made by the Commenter, and Fidelity's response thereto, the Department believes that a Client Plan's interests in connection with the proposed payment of Performance Fees to Fidelity should be represented by an Independent Fiduciary which has sufficient knowledge, experience and expertise to enable such fiduciary to adequately protect the interests of the Client Plan.[2]

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[1] See 29 CFR 2510.3–101 for the Department's regulations defining ''plan assets'' that are subject to Title I of the Act.

[2] As noted in Footnote 3 of Paragraph 3 in the Summary of Facts and Representations in the Proposal, the Department expects a plan fiduciary, prior to entering into any performance-based compensation arrangement with an investment manager, to fully understand the risks and benefits associated with the compensation formula

Thus, the Department believes that the Commenter's recommendations have merit as long as the Client Plan's interests are protected by a sophisticated fiduciary that is thoroughly familiar with the Performance Fee arrangement and monitors such arrangement for the Client Plan. In this regard, the Department expects that a particular sophisticated fiduciary which initially acts for a Client Plan as an Independent Fiduciary for the Plan's approval of a Performance Fee for Fidelity should continue to serve in that role throughout the duration of such Plan's participation in the Account.

Therefore, the Department has determined to modify the language of Section III(c)(1) as follows:

''* * * Each Client Plan shall have total net assets with a value in excess of $50 million or, alternatively, be represented by an Independent Fiduciary that is responsible for the investment of at least $50 million in ''plan assets'' subject to the provisions of the Act. [emphasis added]

With respect to the second recommendation made by the Commenter, and Fidelity's response thereto, the Department does not believe that elimination of requirements in Section III(i) of the Proposal is warranted. In general, the Department views the payment of a Performance Fee as a reward for superior investment performance for assets acquired by an Account. The ''Target Amount'' concept (as defined in Section IV(e) of the Proposal) ensures that Fidelity will only receive a Performance Fee if each particular asset has at least reached its intended or ''targeted'' value at the time of sale. Thus, the Department believes that after the Threshold Amount (as defined in Section IV(d) of the Proposal) has been reached, the sale of any asset by an Account at a price which is less than the Target Amount established for such asset should not entitle Fidelity to the receipt of a Performance Fee at the time of sale unless an Independent Fiduciary is made aware of, and specifically approves, the sale at that time. Accordingly, the Department has determined not to adopt the Commenter's recommendations with respect to the provisions of Section III(i) of the Proposal.

In addition to the issues raised by the Commenter, the applicant (i.e. Fidelity) submitted the following comments and/ or requests for modifications regarding the Proposal.

First, Fidelity states that Section III(e)(3) of the Proposal requires, in pertinent part, that no independent appraisals will be required for assets acquired for an Account within the twelve (12) months preceding the end of the period covered by the report, unless such appraisals are necessary for purposes of determining any compensation due to Fidelity based on the value of the assets in the Account for that period. Fidelity notes that this condition seems to suggest that independent appraisals will be required for assets after the twelve (12) month period mentioned therein, even where Fidelity's fees are not based on the value of the assets in the Account. In this regard, Fidelity states that in certain instances it's Base Fee for an Account may be based on the amount of capital invested in the Account, rather than on the value of the assets in the Account [see Footnote 7 in Paragraph 5 of the Summary of Facts and Representations (the Summary) in the Proposal]. Thus, Fidelity requests that the words ''* * * for assets acquired for the Account within the twelve (12) months preceding the end of the period covered by the report * * *'' in Section III(e)(3) of the Proposal be deleted in order to clarify that no appraisals will be required for assets held in an Account *at any time* unless compensation payable to Fidelity is based on the ''value'' of the assets in the Account.

The Department concurs with Fidelity's requested clarification and has so modified the language of the Proposal.

Second, with respect to the condition set forth in Section III(j) dealing with the calculation and payment of any Performance Fee in the event Fidelity resigns as investment manager or trustee of an Account, Fidelity states that there is a fraction which is used to reduce the amount of the Performance Fee calculated at the time of resignation to reflect the ultimate value realized by the Account for the assets held in the Account at the time of resignation. The numerator of this fraction equals the sum of the disposition proceeds of all assets in the Account received prior to the termination date of the Account plus the fair market value of the assets remaining in the Account on the termination date. In this regard, Fidelity wishes to clarify for the record that the disposition proceeds which would be included in the numerator of this fraction are disposition proceeds which are received on and after the date of resignation and which arise from the disposition of assets which were included in the Account on the resignation date. However, Fidelity does not believe that any change is required to the language of Section III(j) of the Proposal.

The Department notes the applicant's clarification.

Third, Fidelity states that the first sentence in Footnote 6 in Paragraph 4 of the Summary requires a minor clarification. Footnote 6 states that an Account will not invest in or use any swap transactions (including caps, floors, collars, or options relating thereto), forward contracts, exchanged-traded futures transactions, or options (other than covered call options). Fidelity's comment letter reaffirms its previous representation regarding the exclusion of swap transactions, forward contracts, and exchanged-traded futures transactions. However, Fidelity states that the exclusion with respect to the use of all ''options'' (which do not relate to swap transactions), as stated in Footnote 6, is too broad. In this regard, Fidelity represents that an Account may need to either: (i) Purchase an option to permit the Account to acquire an asset from, or sell an asset to, a third party at a later date, or (ii) sell an option which permits a third party to acquire an asset owned by the Account at a later date (i.e. so-called ''covered'' call options). In addition, Fidelity represents that an Account may need to enter into certain contracts which require the Account to acquire or sell, and a third party to sell or acquire, an asset owned or to be acquired by the Account at a later date. Specifically, Fidelity states that an Account may use such options, or enter into such contracts, to acquire or sell the following: (i) Real estate; (ii) mortgages; (iii) interests in real estate; (iv) partnership interests; (v) joint venture interests; (vi) securities which are not publicly-traded at the time of purchase; or (vii) loans or other debt instruments (whether or not considered ''securities'') which are not rated as investment grade. Fidelity states further that an Account will not use any ''exchange-traded'' options or options which relate to either publicly-traded equity securities or publicly-traded investment grade debt securities. Finally, Fidelity states that in no event will an Account engage in the sale of any ''naked'' options.

The Department notes the applicant's clarification.

No other comments on the Proposal, and no requests for a hearing, were received by the Department during the comment period.

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following disclosure by the investment manager of all relevant information pertaining to the proposed arrangement. In addition, a plan fiduciary must be capable of periodically monitoring the actions taken by the investment manager in the performance of its duties and must consider, prior to entering into the arrangement, whether such plan fiduciary is able to provide oversight of the investment manager during the course of the arrangement.

Accordingly, the Department has determined to grant the proposed exemption as modified herein.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

Michael Elkin Individual Retirement Account (the IRA) Located in New York, New York

[Prohibited Transaction Exemption 95–101; Application No. D–10022]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed purchase for cash of a certain limited partnership interest in the Medallion Fund (the Interest) by the IRA from Michael Elkin, a disqualified person with respect to the IRA,[3] provided the following conditions are met:

(a) The purchase is a one-time transaction for cash;

(b) The terms and conditions of the purchase are at least as favorable to the IRA as those obtainable in an arm's-length transaction with an unrelated party;

(c) The IRA pays no more than the fair market value of the Interest, as established by an independent qualified appraiser at the time of the transaction;

(d) The IRA is not required to pay any commissions, costs or other expenses in connection with the transaction; and

(e) The fair market value of the Interest is based on an independent valuation of the total net asset value of the Fund and does not represent more than 25% of the total assets of the IRA at the time of the transaction.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the notice of proposed exemption Notice published on September 21, 1995, 60 FR 49022.

FOR FURTHER INFORMATION CONTACT: Mr. E.F. Williams of the Department, telephone (202) 219–8194. (This is not a toll-free number.)

The Age-Based Profit Sharing Plan and Trust of Carolina OB–GYN Care, P.A. (the Plan) Located in Spartanburg, South Carolina

[Prohibited Transaction Exemption 95–102; [Application No. D–10061]

[3] Pursuant to 29 CFR 2510.3–2(d), there is no jurisdiction with respect to the IRA under Title I of the Act. However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code.

Exemption

The restrictions of section 406(a), 406 (b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the proposed sale by the individual account (the Account) in the Plan of James C. Montgomery, M.D., of a parcel of real property (the Property) to Dr. Montgomery, a party in interest with respect to the Plan, and the assumption by Dr. Montgomery of the Account's current indebtedness with respect to the Property, provided that the following conditions are satisfied: (a) The purchase price is the greater of $120,000 or the fair market value of the Property as of the date of the sale; (b) the fair market value of the Property is determined by a qualified, independent appraiser as of the date of the sale; and (c) the Account pays no commissions or other expenses relating to the sale.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on September 25, 1995 at 60 FR 49425.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219–8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application are true and complete and accurately describe all material terms of the transaction which is the subject of the exemption. In the case of continuing exemption transactions, if any of the material facts or representations described in the application change after the exemption is granted, the exemption will cease to apply as of the date of such change. In the event of any such change, application for a new exemption may be made to the Department.

Signed at Washington, D.C., this 31st day of October, 1995.

Ivan Strasfeld,

Director of Exemption Determinations Pension and Welfare Benefits Administration, U.S. Department of Labor.

[FR Doc. 95–27296 Filed 11–2–95; 8:45 am]

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 95–096]

NASA Advisory Council (NAC), Aeronautics Advisory Committee (AAC); Subcommittee on Propulsion Meeting

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Pub. L. 92–463, as amended, the National Aeronautics and Space Administration announces a NAC, Aeronautics Advisory Committee, Subcommittee on Propulsion meeting.

DATES: November 30, 1995, 8:30 a.m. to 5 p.m.; and December 1, 1995, 8:30 a.m. to 4 p.m.

ADDRESSES: National Aeronautics and Space Administration, Lewis Research Center, Administration Building, Room 215, 21000 Brookpark Road, Cleveland, OH 44135.

FOR FURTHER INFORMATION CONTACT: Mr. James Afarin, National Aeronautics and Space Administration, Lewis Research Center, 21000 Brookpark Road, Cleveland, OH 44135, 216/433–6753.

SUPPLEMENTARY INFORMATION: The meeting will be open to the public up to the seating capacity of the room. The agenda for the meeting is as follows: